No. 96-1607

Supreme Court, U.S.
FILED
JUN 11 1997

In The

Supreme Court of the United States

October Term, 1996

DUWAMISH INDIAN TRIBE, SNOHOMISH INDIAN TRIBE and STEILACOOM INDIAN TRIBE,

Petitioners,

vs.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS THE TULALIP TRIBES, MUCKELSHOOT TRIBE, THE NISQUALLY TRIBE, THE PUYALLUP TRIBE AND SQUAXIN ISLAND TRIBE

BILL TOBIN
Attorney for Respondent
The Nisqually Tribe
P.O. Box 1425
Vashon, Washington 98070
(206) 463-3147

ANNETTE M. KLAPSTEIN
Attorney for Respondent
The Puyallup Tribe
2002 East 28th Street
Tacoma, Washington 98404
(253) 593-0228

KEVIN R. LYON
Attorney for Respondent
Squaxin Island Tribe
112 Fourth Avenue, Suite 200
Olympia, Washington 98501
(360) 786-5034

MASON D. MORISSET
Counsel of Record
MORISSET, SCHLOSSER, AYER & JOZWIAK
Attorneys for Respondent
The Tulalip Tribes
801 Second Avenue, Suite 1115
Seattle, Washington 98104-1509
(206) 386-5200

ROBERT L. OTSEA, JR.
Attorney for Respondent
Muckelshoot Tribe
Office of the Tribal Attorney
39015 172nd Avenue S.E.
Auburn, Washington 98002
(253) 939-3311

QUESTION PRESENTED FOR REVIEW

May a 16-year-old judgment be reopened on unsubstantiated allegations concerning the mental capacity of a district court judge, where that judgment was independently confirmed on appeal and where no allegations that the record below was insufficient have been made?

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Contents	ii
Table of Citations	iii
Statement of the Case	1
Reasons for Denying the Writ	3
I. Petitioners' Status Has Been Judicially Determined And They Have Received Due Process.	3
A. Determination By The Special Master.	4
B. Determination By The Trial Court.	5
C. Determination by The Court of Appeals.	7
D. Subsequent Litigation: *Greene v. Lujan.*	8
E. Rule 60(b) Mandated Dismissal Of Petitioners' Motion	11
II. Standards Under Federal Rule Of Civil Procedure 60(b)(6).	12
III. Policies Favoring The Finality Of Judgments Weigh Against Reopening The Judgment In The *Five Tribes Case.*	13

Contents

Page

IV. Policies To Preserve The Integrity Of The Judicial Process Weigh Against Reopening The Judgment. 14

The Judgment Is Correct As A Matter Of Law . 15

The Three Petitioners' Motion Below Was Untimely 16

V. The Alleged Basis For Petitioners' Motion Below, If True, Is Harmless Error Under Fed. R. Civ. P. 61 17

Conclusion 19

TABLE OF CITATIONS

Cases Cited:

Ackermann v. United States, 340 U.S. 193 (1950) ... 12, 13

Anderson v. City of Bessemer City, N.C., 470 U.S. 564 (1985) 13

Blonder-Tongue Labs., Inc. v. University of Illinois Found., 402 U.S. 313 (1971) 12

Boomhower, Inc. v. American Auto. Ins. Co., 220 F.2d 488 (D.C. Cir.), *cert. denied*, 350 U.S. 833 (1955) 14, 15

Contents

Page

Cardinal Chem. Co. v. Morton Int'l., Inc., 508 U.S. 83 (1993) 14

Eckis v. Graver Tank and Mfg. Co., 289 F.2d 335 (9th Cir. 1961) 18

Greene, et al. v. Lujan (W.D. Wash., Cause No. 89-CV-645Z) 8, 9, 10

Greene, et al. v. United States, et al., 996 F.2d 973 (9th Cir. 1993) 9

Hygh v. Jacobs, 961 F.2d 359 (2nd Cir. 1992) 18

Klapprott v. United States, 335 U.S. 601 (1949) 12

Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847 (1988) 14, 15, 17

Moran v. H.W.S. Lumber Co., 538 F.2d 238 (9th Cir. 1976) 18

United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974) 1, 10, 11

United States v. Washington, 459 F. Supp. 1020 (W.D. Wash. 1978) 1, 10

United States v. Washington, 476 F. Supp. 1101 (W.D. Wash. 1979), *aff'd*, 641 F.2d 1368 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982) 1, 5, 6, 7, 8, 13, 15, 18

Contents

	Page
United States v. Washington, 626 F. Supp. 1404 (W.D. Wash. 1985)	1, 10, 14
United States v. Washington, Civ. 9213 (W.D. Wash., 1970) (Sept. 13, 1974 Order, Docket No. 772)	3
United States v. Washington, Civ. 9213 (W.D. Wash., 1970) (Sept. 13, 1974 Order Referring, Docket No. 772)	4
United States v. Washington, Civ. 9213 (W.D. Wash., 1970) (March 5, 1975 Master's Report, Docket No. 772)	5
United States v. Washington, Civ. 9213 (W.D. Wash., 1970) (Aug. 7, 1975 Order, Docket No. 1245)	5
United States v. Washington, Civ. 9213 (W.D. Wash., 1970) (Oct. 28, 29 and 30, 1975 Transcripts of hearings)	5
United States v. Washington, Civ. 9213 (W.D. Wash., 1970) (Mar. 19, 1976 Order, Docket No. 1966)	5
United States v. Washington, Civ. 9213 (W.D. Wash., 1970) (Motion of Samish, *et al.*, Feb. 16, 1979, Docket No. 5619)	5
United States v. Washington, Civ. 9213 (W.D. Wash., 1970) (Mar. 23, 1979 Order, Docket No. 5726)	6

Contents

	Page
United States v. Washington, Civ. 9213 (W.D. Wash., 1970) (Mar. 23, 1979 Order, Docket No. 5726) ...	6
United States v. Washington, Civ. 9213 (W.D. Wash., 1970, Docket No. 5700)	6
United States v. Washington, Civ. 9213 (W.D. Wash., 1970) (Findings of Fact, Conclusions of law and Decree re treaty Status of Intervenor Duwamish, Samish, Snohomomish, Snoqualmie and Steilacoom Tribes Mar. 23, 1979, Docket No. 5726)	6
United States v. Washington, Civ. 9213 (W.D. Wash., 1970) (April 4, 1979 Minute Order, Docket No. 5753)	6
United States v. Washington, Civ. 9213 (W.D. Wash., 1970) (April 25, 1979 Order Denying Motion for Reconsideration, Docket No. 5802)	6
United States v. Washington, Civ. 9213 (W.D. Wash., 1970) (Feb. 16, 1979 Motion filed by Petitioner, Docket No. 5619)	13
United States v. Washington, Civ. 9213 (W.D. Wash., 1970)	16
Ward v. Village of Monroeville, 409 U.S. 57 (1972) ..	15

Contents

Page

Statutes Cited:

28 U.S.C. § 294 15

28 U.S.C. § 294(c) 6

28 U.S.C. § 455 15

Rules Cited:

Federal Rule of Civil Procedure 52(a) 13

Federal Rule of Civil Procedure 60 ..... 9, 19

Federal Rule of Civil Procedure 60(b) 1, 11

Federal Rule of Civil Procedure 60(b)(3) 16, 17

Federal Rule of Civil Procedure 60(b)(6) .....
..... 2, 12, 13, 14, 16, 17

Federal Rule of Civil Procedure 61 ..... 17, 18, 19

Other Authority Cited:

25 C.F.R. § 83 8

STATEMENT OF THE CASE

In the court below, three organizations calling themselves Indian tribes, the Snohomish, Steilacoom, and Duwamish ("three petitioners"), pursuant to Federal Rule of Civil Procedure 60(b) sought to reopen a judgment in *United States v. Washington*, 476 F. Supp. 1101 (W.D. Wash. 1979) (*Five Tribes Case*), *aff'd*, 641 F.2d 1368 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982). They had originally sought intervention in the massive litigation involving Indian treaty rights *United States v. Washington, et al.* (Civ. No. 9213, W.D. Wash.). The judgment they appealed from determined that they were not successors in interest to certain treaty signatories who had signed treaties with the United States government in 1854 and 1855. Nor were these organizations politically recognized by the federal government as Indian tribes. That judgment is supported by the tribes signatory to this brief.

The three petitioners here had neither standing nor substantive rights on which to base participation in the original litigation. Other federally recognized tribes have been found to be the successors in interest to the treaty signatories bearing the tribal names of petitioners. The Tulalip Tribes, plaintiff-intervenors below and respondents here, are the present-day successors in interest to the Snohomish Tribe. *United States v. Washington*, 459 F. Supp. 1020, 1039 (W.D. Wash. 1978); 626 F. Supp. 1405, 1527 (W.D. Wash. 1985). The Nisqually Tribe has been held to be a successor-in-interest to the Steilacoom Tribe at Treaty Times. *United States v. Washington*, 384 F. Supp. 312 at 368 (W.D. Wash. 1974). The Puyallup Tribe also exercises treaty fishing rights in areas known to be claimed by the so-called Steilacoom Tribe. *See United States v. Washington*, 626 F. Supp. 1404, 1441 (W.D. Wash. 1985).

These petitioners sought to reopen the final judgment below to determine whether the Honorable George Boldt, the trial judge

in this case at the time — now deceased — was mentally impaired when he signed the findings and conclusions of law in the case. They alleged no specific errors in the decision nor did they present newly discovered evidence on the merits. They provided no evidence concerning the trial judge's competence other than a newspaper article and a death certificate. Their request to reopen was denied by the district court for a number of persuasive reasons.

Noting that fifteen years had passed since Judge Boldt's decision, the court held that the three petitioners had failed to demonstrate the existence of any extraordinary circumstances that would warrant reopening the final order. Three main reasons were noted:

> First, the courts should avoid disturbing the public interest in the finality of judgments;
>
> Second, a ruling for the petitioners would open the floodgates to future challenges to judgments on grounds of judicial incompetence; and
>
> Third, the tribes had suffered no manifest injustice because the magistrate judge in the Ninth Circuit reached the same conclusion as the District Court judge.

United States v. Washington, 95-35202 (9th Cir. Oct. 23, 1996 opinion) (pp. 9a-10a of Appendix A to Petitioner's Petition for Writ of Certiorari.)

Noting that it should use Rule 60(b)(6) sparingly as an equitable remedy, the Ninth Circuit upheld the District Court's ruling and found no abuse of discretion in denying the petitioner's motion to reopen the judgment below. *Id.* p. 11a.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS' STATUS HAS BEEN JUDICIALLY DETERMINED AND THEY HAVE RECEIVED DUE PROCESS.

The main thrust of the petition for certiorari is the claim that these groups have been denied due process. (Petitioners' Petition for a Writ of Certiorari, April 7, 1997. p. 4). These three groups have already had numerous bites of the apple concerning their status and sought yet one more below. In 1974, alleging treaty rights, the three petitioners, plus a group calling themselves "Snoqualmie," were allowed to intervene in *United States v. Washington,* Civ. 9213 (W.D. Wash., 1970) (Sept. 13, 1974 Order, Docket No. 772). It is important to note that these "groups" were not legally or politically "Indian tribes" as recognized by United States law. They were merely groups of individuals who may or may not be able to trace racial bloodlines to certain individuals who would be deemed, anthropologically, to have been "members" of certain aboriginal groups in the mid-1850's.

The petitioners constantly "bootstrap" their position with questionable statements. The extent of this bootstrapping is well illustrated by footnote 7 of their Petition. (Petitioners' Petition for a Writ of Certiorari, April 7, 1997, n. 7, p. 16). In that footnote, they make a number of incorrect statements. For example, they state that it was not until February 1978 that Judge Boldt was "diagnosed with Alzheimer's." Of course, there is no evidence that Judge Boldt was ever actually diagnosed with Alzheimer's. That allegation is based solely on a newspaper article and a death certificate signed many years later by an attending physician who has not been shown to have any

knowledge of Judge Boldt's condition in 1979. Further in that footnote, the petitioners opine that they did not have the opportunity to observe Judge Boldt until many years later, when they learned of his alleged Alzheimer's and the "likely reason" for his "otherwise inexplicable ruling."

Why petitioners consider his ruling inexplicable is itself inexplicable. The ruling of the district court followed the ruling of the magistrate judge who heard the case originally. The decision to allow Judge Boldt to continue with the case was made by the senior Judge McGovern of the district. The case was then given "close scrutiny" and a decision made by the Ninth Circuit. The only thing inexplicable about this entire controversy is petitioners' inexplicable ability to accept the finality of a judgment. Judge Boldt's ruling was entirely rational given the magistrate judge's original decision, the decision of the senior judge of the district to having decide the case, and its ultimate affirmance after "close scrutiny" by the Ninth Circuit.

That petitioners have received substantial due process is illustrated by the determinations in this case which are set out below.

A. Determination By The Special Master.

On September 13, 1974, Senior United States District Judge George Boldt referred the issue of the treaty status of petitioners to Federal Magistrate Judge Robert E. Cooper sitting as a special master. *United States v. Washington*, Civ. 9213 (W.D. Wash., 1970) (Sept. 13, 1974 Order Referring, Docket No. 772). Magistrate Judge Cooper had extensive judicial experience as a federal magistrate. He continued to hear matters referred to him in the continuing fishing rights case thereafter for many years. After full consideration and five days of hearings, Magistrate Judge Cooper determined that the three petitioners

were not treaty successors. He made recommended findings of fact to support that determination. Masters' Report . . . , March 5, 1975, *United States v. Washington,* Civ. 9213 (W.D. Wash., 1970) (March 5, 1975 Master's Report, Docket No. 772).

B. Determination By The Trial Court.

Not satisfied with the result, petitioners then appealed to District Court Judge George Boldt who ordered a *de novo* evidentiary hearing after receiving the master's report. *United States v. Washington,* Civ. 9213 (W.D. Wash., 1970) (Aug. 7, 1975 Order, Docket No. 1245). He allowed all evidence submitted before the master to be considered by the district court, and allowed substantial additional evidence to be submitted. A three-day trial was held in October of 1975 at which written evidence was submitted and live testimony was taken. *United States v. Washington,* Civ. 9213 (W.D. Wash., 1970) (Oct. 28, 29 and 30, 1975 Transcripts of hearings). After reviewing the record, Judge Boldt directed the three petitioners to submit additional evidence, *United States v. Washington,* Civ. 9213 (W.D. Wash., 1970) (Mar. 19, 1976 Order, Docket No. 1966), and heard oral argument on January 7, 1977. After that hearing, he allowed the submission of even more written evidence and the submission of proposed findings by all parties.

Early in 1979, before rendering a final decision, Judge Boldt announced that he had asked to be relieved of judicial duties because of failing health. On February 16, 1979, two of the three petitioners requested that Judge Boldt be allowed to resolve the *Five Tribes Case. United States v. Washington,* Civ. 9213 (W.D. Wash., 1970) (Motion of Samish, *et al.*, Feb. 16, 1979, Docket No. 5619). Then Chief Judge Walter T. McGovern took the matter under advisement and granted the motion. The Chief Judge determined that it was "in the best interests of judicial administration and economy, and in the interest of all parties,"

that Judge Boldt undertake the task, noting that the judge was willing to do so.[1] The assignment was pursuant to 28 U.S.C. § 294(c) which allows retired judges to be assigned judicial duties they are "able to undertake." Judge Boldt accepted the assignment and issued the *Five Tribes* decision, also concluding that the three petitioners were not successors in interest to treaty signatories and were not entitled to exercise rights under any Indian treaty. *United States v. Washington*, Civ. 9213 (W.D. Wash., 1970) (Mar. 23, 1979 Order, Docket No. 5726).

In making his decision, Judge Boldt generally accepted the proposed findings and conclusions of the United States, which were consistent with the proposed findings of Magistrate Judge Cooper. However, he critically reviewed the proposed findings, making interlineations, deletions, and substitutions.[2] He corrected additional items two weeks later.[3]

The three petitioners herein then moved for reconsideration. After review, the court denied that motion three weeks after its earlier corrections.[4]

---

1. Order Allowing Judge George H. Boldt to Resolve Certain Pending Matters Within *United States v. Washington*, Civ. No. 9213, W.D. Wash., March 14, 1979 (*United States v. Washington*, Civ. 9213 (W.D. Wash., 1970, Docket No. 5700)).

2. *United States v. Washington*, Civ. 9213 (W.D. Wash., 1970) (Findings of Fact, Conclusions of law and Decree re treaty Status of Intervenor Duwamish, Samish, Snohomomish, Snoqualmie and Steilacoom Tribes Mar. 23, 1979, Docket No. 5726). Judge Boldt's corrections appear at p. 3, ll. 8, 30; p. 4, l. 19; p. 5, l. 14; and p. 16, l. 7.

3. *United States v. Washington*, Civ. 9213 (W.D. Wash., 1970) (April 4, 1979 Minute Order, Docket No. 5753).

4. *United States v. Washington*, Civ. 9213 (W.D. Wash., 1970) (April 25, 1979 Order Denying Motion for Reconsideration, Docket No. 5802).

C. Determination By The Court of Appeals.

The three petitioners then appealed to the Ninth Circuit which affirmed the decision after giving it "close scrutiny." 641 F.2d 1368, 1371 (9th Cir. 1981). It is important to note that the Ninth Circuit did not simply engage in a *pro forma* review and affirmance of Judge Boldt's decision. First, the court noted that adoption of proposed findings "without substantial change" was "ordinarily disfavored." *Id.* Thus, said the court, it must give the matter "close scrutiny." *Id.*

Second, the court noted that the district court had applied a wrong legal standard (*i.e.*, that federal recognition or nonrecognition was decisive). It ruled that the correct legal standard involved whether the entity maintained a "cohesive Indian cultural or political" community. It went on to examine the record in detail to determine whether the district court reached the correct result in light of that standard. *Id.* at 1372. It found the trial court result correct and noted that the factual finding that the petitioners had not functioned since treaty times as "continuous, separate, distinct and cohesive Indian cultural or political communit[ies]" was central to the proper legal theory concerning maintenance of an organized tribal structure. The Ninth Circuit independently reviewed the record and "after close scrutiny" concluded "that the evidence supports this finding of fact." *Id.* at 1373.

The Ninth Circuit decision, is an independent judicial determination on the merits of petitioners' case. The alleged incapacity of the trial judge becomes irrelevant since the Court of Appeals reviewed the trial record and made an independent decision. There is no allegation of any error in the development of the trial record.

A petition for rehearing before the Ninth Circuit was denied.

On January 11, 1982, the United States Supreme Court denied the petitioners' petition for certiorari. 454 U.S. 1143 (1982).

D. Subsequent Litigation: *Greene v. Lujan.*

In addition, collateral attacks have been made on the judgment involved here. Petitioners have continued the press for recognition as tribes through the federal tribal acknowledgment process. *See* 25 C.F.R. § 83. Because of an adverse decision in that process, on May 5, 1989, the Samish, one of the five organizations (including the three petitioners herein) who had originally sought intervention in the case, brought suit in federal district court for the Western District of Washington alleging that the Bureau of Indian Affairs' review of their petition for recognition pursuant to the acknowledgment process had been mishandled and, in addition, that they should be entitled to treaty fishing rights. *Greene, et al. v. Lujan* (W.D. Wash., Cause No. 89-CV-645Z).

In that case, the Samish argued that federal regulations concerning recognition were unconstitutional. The district court rejected that notion, ruling that the regulations were not unconstitutional on their face. *See* Order of Feb. 25, 1992, p. 2, ll. 16-19 (W.D. Wash., Cause No. 89-CV-645Z, Docket No. 169). The court did however find that the plaintiffs had a property interest in their status as a recognized tribe and were therefore entitled to a formal adjudication under the Administrative Procedures Act. *Id.*, p. 3, ll. 15-18.

As to the Samish attempts to relitigate the issue as to whether or not they were a successor in interest to the Treaty of Point Elliott and entitled to fishing rights, the court held that they were barred under the doctrine of *res judicata* from relitigating that status, and that "plaintiffs, therefore, have no rights under the Treaty of Point Elliott." Order of Feb. 25,

1992, p. 5, ll. 2-4 (W.D. Wash. Cause No. 89-CV-645Z, Docket No. 169). The court went on to hold that the issue of treaty status had been resolved in *United States v. Washington*, that it was binding in this case, and that "treaty issues cannot be relitigated." *Id.*, p. 7, ll. 16-26. *See also Greene, et al. v. United States, et al.*, 996 F.2d 973, 975 (9th Cir. 1993).

On June 19, 1992, the plaintiffs in *Greene* moved to set aside the original judgment in *United States v. Washington* under Fed. R. Civ. P. 60 on the grounds that the trial judge *might* have suffered a mental disability at the time he signed the final findings in the case. Motion to Set Aside . . . , June 19, 1992, *Greene, et al. v. Lujan* (W.D. Wash. Cause No. 89-CV-645Z, Docket No. 184).

At a hearing held September 18, 1992, the Honorable Thomas S. Zilly, United States District Judge, denied the plaintiffs' motion. In that proceeding, Judge Zilly noted that there were a number of reasons why the motion should not be brought in his court as opposed to the ongoing litigation of *United States v. Washington*. In addition, he noted that when Judge Boldt originally considered these issues:

> . . . there were numerous hearings that were conducted. He appointed a special magistrate to consider and receive evidence. He gave notice to the Samish and other tribes that they could present additional evidence. He alerted the Samish and the total of five tribes, I believe, that there were factors which suggested that they would not be given recognition. The Samish submitted substantial additional evidence that was considered by the judge. The judge then after many months of deliberations and after

> several hearings made his findings, which were affirmed by the Ninth Circuit after careful scrutiny by that court.

Greene, et al. v. Lujan (W.D. Wash. Cause No. 89-CV-645Z, Docket No. 184, Transcript of September 18, 1992, p. 38 thereof).

Subsequently, judgment on these issues was entered. *See* Order of Oct. 16, 1992, *Greene, et al. v. Lujan* (W.D. Wash. Cause No. 89-CV-645Z, Docket No. 217, Transcript of September 18, 1992, p. 38 thereof).

The Snohomish, Steilacoom, and Duwamish, petitioners in this case, then sought relief from the 1979 judgment in the proceedings below, using the arguments previously advanced by the Samish tribe in *Greene*.

The goal of these organizations to reopen the judgment and intervene in this case is to be allowed to exercise treaty fishing rights. However, the descendants of the Tribal signatories representing the Snohomish, Steilacoom and Duwamish have *already* been recognized as possessing treaty rights through their respective successors in interest. For example, the Tulalip Tribes, intervenors herein, are the present-day successors in interest to the Snohomish tribe. *United States v. Washington*, 459 F. Supp. 1020, 1039 (W.D. Wash. 1978); 626 F. Supp. 1405, 1527 (W.D. Wash. 1985). Thus, Snohomish people who enroll at Tulalip may exercise their treaty rights through The Tulalip Tribe, a federally recognized tribe. The Nisqually Tribe has been held to be a successor-in-interest to the Steilacoom Tribe at Treaty Times. *United States v. Washington*, 384 F. Supp. 312 at 368 (W.D. Wash. 1974). The court noted that the Indians who were assigned to the Nisqually Reservation included those identified in the Treaty Preamble as Steilacoom, and that they were thereafter

"known as Nisqually Indians and were dealt with by the United States as a separate collective entity." *United States v. Washington*, 384 F. Supp. 312 at 368.

The petitioners make it clear that they want to independently attempt to exercise fishing rights if allowed to reopen and retry the case rather than work through established tribal organizations. *See* Appellants' Memorandum of Points and Authorities, May 25, 1994, p. 2, n. 2, *United States v. Washington* (Civ. No 9213, W.D. Wash., Subproceeding No. 93-2, Docket No. 43).

E. Rule 60(b) Mandated Dismissal Of Petitioners' Motion.

Federal Rule of Civil Procedure 60(b) provides:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation

> of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. . . .

The court below correctly applied the rule to this situation.

II.

STANDARDS UNDER FEDERAL RULE OF CIVIL PROCEDURE 60(b)(6).

Petitioners appeared to primarily rely on subdivision (b)(6) of the rule in the district court. Only "extraordinary circumstances" justify relief from judgment under Rule 60(b)(6). *Ackermann v. United States*, 340 U.S. 193, 212 (1950) (litigant's choice not to appeal because of perceived financial sacrifice not enough under Rule 60(b)(6)); *see Klapprott v. United States*, 335 U.S. 601 (1949) (Rule 60(b)(6) relief justified where defendant was sick, poor, and in prison when default judgment entered against him). No extraordinary circumstances exist here, and the public interest outweighs the interests of the three petitioners.

The petitioners had a full and fair opportunity to litigate their claims and do not allege otherwise. *Cf. Blonder-Tongue Labs., Inc. v. University of Illinois Found.*, 402 U.S. 313, 329 (1971) (collateral estoppel standards). They have had at least three independent judicial determinations of their status. First by Federal Magistrate Judge Cooper, second by District Judge Boldt, and third by the Ninth Circuit Court of Appeals.

Further, knowing of Judge Boldt's request to be relieved of further duties, the Snohomish and Steilacoom petitioners chose

to have him decide their case. *United States v. Washington,* Civ. 9213 (W.D. Wash., 1970) (Feb. 16, 1979 Motion filed by Petitioner, Docket No. 5619). That action was approved by Senior District Judge McGovern. They freely took the risk that the decision might be adverse to them. "There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from." *Ackermann*, 340 U.S. at 198.

III.

FOLICIES FAVORING THE FINALITY OF JUDGMENTS WEIGH AGAINST REOPENING THE JUDGMENT IN THE *FIVE TRIBES CASE.*

The three petitioners say that Judge Boldt's adoption of most of the United States' proposed findings without change is an "extraordinary fact" that demonstrates his reasoning was impaired and supports reopening the judgment under Rule 60(b)(6). But, "even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 572 (1985); *see* Fed. R. Civ. P. 52(a) ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous"). In this case the Ninth Circuit held that Judge Boldt's findings were not clearly erroneous, 641 F.2d at 1374. It also independently determined that key findings were correct. *Id.* at 1373. The Supreme Court denied certiorari. 454 U.S. 1143 (1982). Judge Boldt's signing of findings proposed to him by a prevailing party, with only minor changes, is not an "extraordinary fact" to justify reopening a final judgment.

The public and especially the parties in this case have an interest in the finality and certainty of judgments, especially where interests of those other than the litigants are at stake. *See*

Cardinal Chem. Co. v. Morton Int'l., Inc., 508 U.S. 83 (1993) (public interest in finality of patent litigation). Here, there have been substantial proceedings since the 1979 decision. For example, the courts have approved state-tribal fish management plans and decided allocation issues in reliance on the 1979 judgment. *E.g.*, 626 F. Supp. at 1527 (order approving 1985 Puget Sound Salmon Management Plan); 626 F. Supp. at 1471-83 (orders approving agreements between the Tulalip Tribes and other tribes). It is not in the public interest to reopen the 1979 judgment as the three petitioners suggest.

IV.

POLICIES TO PRESERVE THE INTEGRITY OF THE JUDICIAL PROCESS WEIGH AGAINST REOPENING THE JUDGMENT.

Courts must also weigh "the risk of undermining the public's confidence in the judicial process" in determining whether to grant relief under Rule 60(b)(6). *Cf. Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988). Here, the three petitioners say that the *possibility* that Judge Boldt *might* have been suffering from Alzheimer's disease in 1979 is an "extraordinary fact" justifying relief under Rule 60(b)(6). The only "fact" is a "possibility." If speculation about the "possibility" that a judge's mental capacity was impaired were a basis for reopening judgments grounded on findings of fact which are clearly not erroneous, then any judgment could be suspect. That would certainly "undermin[e] the public's confidence in the judicial process" and invite public ridicule of private deliberations of federal judges.

A judgment is not defective merely because the judge who rendered it has retired because of a permanent disability. *Boomhower, Inc. v. American Auto. Ins. Co.*, 220 F.2d 488,

490-91 (D.C. Cir.), *cert. denied*, 350 U.S. 833 (1955). Any retired judges, including those who have retired for health reasons, may be assigned judicial duties if they are willing and able to perform them. *Id.*; 28 U.S.C. § 294. That procedure was followed in this case below. *United States v. Washington* (Civ. No. 9213, W.D. Wash., Order, March 14, 1979, Docket No. 5700). The Chief Judge of the court made a determination that Judge Boldt was willing and able to make a ruling. Granting the three petitioners' motion would presume, without foundation, that the decision of the Chief Judge was wrong.

The three petitioners cite *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988) as supporting their petition. (Petitioner's Petition for a Writ of Certiorari, April 7, 1997, p. 14). In *Liljeberg*, a judge had violated 28 U.S.C. § 455 by hearing a case in which he had a financial interest. Vacating the judgment was appropriate there because an appearance of partiality undermines the integrity of the judicial process: Due process requires an impartial decision-maker. *Ward v. Village of Monroeville*, 409 U.S. 57, 62 (1972). But Judge Boldt did not violate any law, and the three petitioners got all the process they were due. Indeed, as we have noted above, they received substantial due process. *Liljeberg* does not support petitioners' case.

The Judgment Is Correct As A Matter Of Law

The Ninth Circuit affirmed the lower court's original 1979 decision after giving it "close scrutiny," 641 F.2d 1368, 1371 (9th Cir. 1981). It did not simply engage in a *pro forma* review but announced the correct legal standard to be applied and independently examined the record in detail to determine whether the district court reached the correct result in light of that standard. *Id.* at 1372. After reviewing the record and "after close scrutiny" the circuit court concluded "that the evidence supports the key finding of fact concerning the status of appellants." *Id.* at 1373.

The Ninth Circuit decision is an independent judicial determination on the merits of petitioners' case and is the law on this matter. The alleged incapacity of the trial judge at a late stage of the trial proceedings, after proper and fair development of a full record, is irrelevant.

The Three Petitioners' Motion Below Was Untimely

The three petitioners asked the court below to allow them to conduct discovery on "the existence of any impermissible *ex parte* communications by any individuals which may have affected Judge Boldt's ability to make a competent decision." Appellants' Memorandum of Points and Authorities, served on counsel November 22, 1993, unsigned and undated, p. 6, ll. 5-8, *United States v. Washington,* Civ. 9213 (W.D. Wash., 1970). Although petitioners claim their motion is brought under subdivision (b)(6), to the extent the three petitioners allege misconduct by an adverse party, their motion is untimely under Fed. R. Civ. P. 60(b)(3):

> [T]he court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud
>
> (. . .), misrepresentation, or other misconduct of an adverse party. . . . The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) *not more than one year* after the judgment, order, or proceeding was taken.

(Emphasis added.) Here, petitioners' motion is obviously made more than one year after the final judgment in 1979. Further, they made it more than one year after they knew of the basis for

the motion. Papers filed with the three petitioners' original brief in the subproceeding below show that they knew the basis for their motion since at least June of 1992. Yet they delayed their original filing until just before Thanksgiving Day 1993. The three petitioners may not avoid the Rule 60(b)(3) time bar by disguising their motion as one under 60(b)(6). *Liljeberg*, 486 U.S. at 863 n. 11.

Even under Rule 60(b)(6), which requires only that the motion be "made within a reasonable time," the three petitioners' request was untimely.

V.

THE ALLEGED BASIS FOR PETITIONERS' MOTION BELOW, IF TRUE, IS HARMLESS ERROR UNDER FED. R. CIV. P. 61.

Finally, petitioners' arguments, even if assumed to be true, are for naught. They have received "substantial justice" and thus their motion is barred by Fed. R. Civ. P. 61.

Petitioners allege that the trial judge *may* have been mentally impaired. Assuming, *arguendo*, that there was some impairment at the time the judgment was signed and entered, the signing would be harmless error under Fed. R. Civ. P. 61. That rule provides:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error

> or defect in the proceeding which does not affect the substantial rights of the parties. Fed. R. Civ. P. 61.

Thus, an alleged error is to be disregarded if it does not "affect the substantial rights of the parties." *Id.* Further, refusal to take the extraordinary step of "disturbing" a final judgment is mandated unless such refusal ". . . appears to the court inconsistent with substantial justice." *Id.*

The burden of demonstrating reversible error is on the party asserting error, and a showing of denial of substantial justice is required. *Hygh v. Jacobs*, 961 F.2d 359 (2nd Cir. 1992).

Here, the alleged error does not affect the substantial rights of the petitioners. The final independent decision of the Ninth Circuit determined those. As we have seen, the Ninth Circuit independently determined the correctness of the result, based on a record which has not been impeached nor challenged. Where substantial rights are not affected, no actionable harm occurs. *Moran v. H.W.S. Lumber Co.*, 538 F.2d 238 (9th Cir. 1976) (error in improperly admitting some evidence was harmless in light of other overwhelming evidence). *Eckis v. Graver Tank and Mfg. Co.*, 289 F.2d 335 (9th Cir. 1961) (improper admission of evidence which is merely cumulative of matters shown by admissible evidence is harmless).

Further, refusal to disturb the ruling is not inconsistent with substantial justice. Petitioners presented their case to four judicial entities; the magistrate sitting as a special master, the trial judge, the Court of Appeals, and the United States Supreme Court.[5] In addition, the Chief Judge of the District Court determined that the trial judge was capable of rendering a decision. A complete and full opportunity to develop a record

5. The Supreme Court refused to grant certiorari and did not review the matter. 454 U.S. 1143 (1982).

was supplied and utilized by them. They have alleged no deficiencies in the development of that record. It is difficult to imagine a more thorough and fair process than that received by petitioners.

Petitioners thus have not met their burden. Rather, they allege that there *might* have been error at the time the trial judge signed the final trial court findings. Given the independent consideration of the matter by other judicial persons, including a definitive ruling by the Court of Appeals, the signing of findings by a disabled judge, would be at most, harmless error. Simply put, the Ninth Circuit independently determined and confirmed the merits on a unimpeached record. The trial judge's alleged incapacity is essentially irrelevant. This is not to minimize the role of the district court judge in litigation. Where, however, as here, there is no error in the development of the record, the court's decision substantiates that of a special master, and the Court of Appeals independently reviews the record and makes determinations, the trial judge's role is less critical.

CONCLUSION

The Snohomish, Steilacoom, and Duwamish petitioners have not shown extraordinary circumstances that would justify reopening the earlier judgment in *United States v. Washington*, under Fed. R. Civ. P. 60. Nor have they met their burden of demonstrating reversible error under Fed. R. Civ. P. 61. In fact, they received substantial due process in their case.

- Federal Magistrate Judge Cooper held fact-finding hearings and issued a report adverse to their position. Petitioners have alleged no error in Judge Cooper's decision nor in that process.

- A trial *de novo* was held before the district court, including substantial additional exhibits and live

testimony. Petitioners have alleged no errors in the development of the trial record.

- Chief Judge McGovern of the district court then determined that it was in the best interest of justice that Judge Boldt complete the case. Petitioners have alleged no error in Judge McGovern's decision.

- The Ninth Circuit reviewed the case and independently confirmed the result. Petitioners have alleged no errors in that process.

All that the petitioners claim is that the trial judge *might* have been incapacitated at the time the final findings in this case at the district court level were signed. This is an insufficient basis on which to disturb a final judgment.

The petitioners' motion below ignored the judgment and determination of the federal magistrate who originally heard the case, sullied the memory of the distinguished jurist, now deceased, who heard the case, denigrated the judgment of the Chief Judge who allowed the district judge to complete work on the case, and disregarded the judgment of the Court of Appeals which independently determined that the correct result had been reached.

The public interest in the finality of judgments and in the integrity of the judicial process, as well as the rights of the parties in this case, outweigh any interests of the petitioners. Petitioners' request here is particularly offensive where they seek to engage in a fishing expedition into the health and mental capacity of a deceased jurist. Their untimely and inadequately supported motion for relief from judgment was properly denied by the district court and the Ninth Circuit properly affirmed it. Those rulings should be left undisturbed. Certiorari should be denied.

Respectfully submitted,

MASON D. MORISSET
Counsel of Record
MORISSET, SCHLOSSER, AYER
& JOZWIAK
Attorneys for Respondent
The Tulalip Tribes
801 Second Avenue, Suite 1115
Seattle, Washington 98104-1509
(206) 386-5200

ROBERT L. OTSEA, JR.
Attorney for Respondent
Muckelshoot Tribe
Office of the Tribal Attorney
39015 172nd Avenue S.E.
Auburn, Washington 98002
(253) 939-3311

BILL TOBIN
Attorney for Respondent
The Nisqually Tribe
P.O. Box 1425
Vashon, Washington 98070
(206) 463-3147

ANNETTE M. KLAPSTEIN
Attorney for Respondent
The Puyallup Tribe
2002 East 28th Street
Tacoma, Washington 98404
(253) 593-0228

KEVIN R. LYON
Attorney for Respondent
Squaxin Island Tribe
112 Fourth Avenue, Suite 200
Olympia, Washington 98501
(360) 786-5034